SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NORMAN MARKUSON,

Appellant.

vs.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck,

Respondent.

Appeal from the District Court of the United States for the District of North Dakota.

BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF FACTS.

The appellant, Norman Markuson, a citizen of the United States and of the State of North Dakota was in June, 1897, proceeded against in that state

by an information filed in the state court by the state's attorney wherein Markuson was charged with the commission of a public offense, to-wit,—the crime of contempt of court, in that in certain proceeding for the enforcement of the prohibitory laws of said state against the sale of intoxicating liquors an injunctional order was issued and while the same was in force, Markuson, the defendant in that proceeding, with others, violated the injunction.

The information further charged that on June, 29th, 1895, the said Markuson had been convicted of criminal contempt under chapter 110 of the laws of 1890 of the State of North North. Upon this information an attachment was issued against Markuson by the State District Court in which the proceedings were pending, and he was brought before it to answer for the contempt. Thereupon, upon the 3rd day of August, 1897, he was arraigned before the judge of the district court of the fith judicial district for the county of Barnes in said state of North Dakota, and moved that the attachment be dismissed and quashed, because, first—that the search warrant set forth in the information directing the seizure of certain property, was contrary to provisions of section 18 of the constitution of North Dakota as being unreasonable, vague and indefinite, and not particularly describing the place to be searched, or the things to be seized. Again, because the provisions of Section 7605 of the Code of North Dakota under which the proceedings were had, are in conflict with Section 13 of the constitution of the state of North Dakota. Again, because there is another remedy

provided by the statute of North Dakota for the offense charged in the information.

He further demanded the right to plead and be tried by the laws regulating criminal contempt as defined by Article I, chapter 34, ot the Code of Civil Procedure,—and all of said motions were overruled.

Thereafter Markuson entered a plea of not guilty and thereupon in open court demanded a trial by jury, which demand was denied by the court and the defendant excepted to it. The court then proceeded to hear the case, and certain witnesses were examined therein, and certain documentary evidence was introduced, and thereafter the case being closed, the court made its findings of fact and conclusions of law.

And by the sixth finding of fact, found as follows,—"That the said defendant, Norman Markuson, was tried and found guilty and convicted on the 29th day of June, 1895, for violating the lawful provisions of a certain injunctional order issued by the judge of this court under and pursuant to Section 13 of Chapter 110 of the Laws of 1890 of the State of North Dakota, being section 7605 of the Revised Code of said State."

And as conclusions of law the court found,—"That said defendant, Norman Markuson, is guilty of criminal contempt of court as provided by Section 7605 of the Revised Code of the State of North Dakota, and that said contempt is and constitutes the second offense of contempt under and against

the provisions of Section 7605 of the Revised Code of the State of North Dakota."

And thereupon the court made the following order,—"It is hereby ordered that the judgment and sentence of the court be rendered and pronounced in open court in the presence and hearing of Norman Markuson and that the clerk enter the same upon the minutes of the court. The judgment and sentence against the said defendant Norman Markuson, is that he be imprisoned in the state penitentiary for the state of North Dakota for the period of one year. Let judgment be entered accordingly. By the court. S. L. Glaspell, Judge."

That thereafter and on the 6th day of August, 1897, the defendant perfected an appeal to the Supreme Court of the State of North Dakota and thereafter said supreme court duly and in all things affirmed said judgment, and thereupon and on the 7th day of December, 1897, the said Markuson was committed to and continued to be confined in the Penitentiary of said State of North Dakota at Bismarck of said state until the hearing upon the writ of habeas corpus issued herein by the United States District Court of the State of North Dakota, and until he was released on bail given on the appeal in this cause on the 31st day of March, 1898.

In the month of December, 1897, Markuson filed his petition in this case for a writ of habeas corpus and on the 26th day of January, 1898, by leave of the court, filed his amended petition for the

writ in which he says, that the statutes of the state of North Dakota providing for and regulating all proceedings which were enforced against him, are enacted, maintained and enforced in violation of the constitution of the United States, and particularly in violation of the Fifth Article of the Amendments to said Constitution of the United States, and in violation of the Sixth Article of the Amendments to the Constitution of the United States, and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in this, that said statutes and the proceedings had thereunder, operate and do abridge the privileges and immunities of citizens of the United States and deprive such citizens of liberty and property without due process of law, in that they deny to such citizens upon a criminal trial the right of trial by jury, and deny to said citizens within the jurisdiction of North Dakota the equal protection of the laws, in that, in and by said statutes it is provided that in prosecutions thereunder a conviction of contempt of court may be had without a trial by jury, and a defendant sentenced to the penitentiary of said state thereunder, whereas in all other criminal prosecutions the citizens of the United States within said state and all persons being found therein are entitled to a trial by jury. And further in this, that in such proceeding a contempt of court is punishable as an infamous crime whereas in all other proceeding a contempt of court is punishable only as and for a misdemeanor.

Other grounds and alleged violations of the constitutional privileges of the petitioner are alleged in

the said petition; and it is further averred therein that he is without means to sue out and prosecute an appeal or writ of error to this court and he thereupon prays for the issuance of the writ.

Upon this petition the writ of habeas corpus was duly issued, and having come on for hearing and determination before the United States District Court for the District of North Dakota, upon the 31st day of March, 1898, judgment was entered therein discharging the writ of habeas corpus and remanding the petitioner therein, Markuson, to the custody of N. F. Boucher, the warden of the State Penitentiary of North Dakota, and from such judgment and determination this appeal is taken.

BRIEF AND ARGUMENT.

Two questions are presented upon this appeal. First,—Does the conviction and sentence of the appellant by the courts of North Dakota for a felony and infamous crime without a trial by jury or a plea of guilty upon his part, violate the constitutional privileges secured to him under the constitution of the United States?

Second,—Is the proceding against the appellant under the statutes of North Dakota by means of which a contempt of court committed by a violation of the prohibitory laws of that state, adjudged to be an infamous crime, punishable by imprisonment in the penitentiary without giving to a defendant therein the right of a trial by jury, (whereas in all other

proceedings for contempt of court under the laws of the State of North Dakota, the offense is defined to be only a misdemeanor punishable by fine and imprisonment in the county jail), due process of law or a denial to any person within the jurisdiction of said state of the equal protection of the laws according to the provisions of Section 1, Article Fourteen of the Amendments to the Constitution of the United States?

Before passing to the argument of the particular questions involved we call the attention of the court to the general condition of the law antecedent to the occurrences herein complained of. The Fourteenth Amendment to the Constitution of the United States took effect on July 28th, 1868. At that time and from the territorial organization of the territory of North Dakota, and up to the first of October, 1889, North Dakota had been a territory of the United States. The Enabling Act of the State of North Dakota was approved February 22nd, 1889. Section 4 of the Enabling Act provides among other things that the "Constitution shall be Republican in form and make no distinction in civil or political rights on account of race, color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Pursuant to the Enabling Act the people of North Dakota on the 1st day of October, 1889, adopted a constitution which was acceptable to

Congress. Among other provisions contained in that constitution are the following:—

"Article I, Section 3. The state of North Dakota is an inseparable part of the American union and the constitution of the United States is the supreme law of the land."

Section 6. "Nor shall cruel or unusual punishments be inflicted."

Section 7. "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law."

Section 8. "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in the time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information. The Legislative Assembly may change, regulate or abolish the grand jury system."

Section 11. "All the laws of a general nature shall have a uniform operation."

Section 13. "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Section 21. "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."

Section 24. "To guard against transgression of the high powers which have delegated, we declare that everything in this article is excepted out of the general powers of government and shall remain forever inviolate."

And in Article II of the Constitution it is provided,—Section 69. "The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say,—* * * 21. For the punishment of crimes."

Section 70. "In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the Legislative Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed." And upon the subject of the particular prosecution and proceedings herein before the court, the constitution ofthe State of North Dakota contains the following,—

Article XX, Section 217. "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a

beverage. The Legislative Assembly shall by law prescribe regulations for the enforcement of the provisons of this article and shall thereby provide suitable penalties for the violation thereof."

With this constitution existent and obligatory upon the legislature that body proceeded to pass certain acts intended to make effectual the prohibitory clause in the constitution which provided among other things that the proceeding to enforce such prohibition should be by bill in equity, that an injunctional order should issue in the first instance and further provides,—"Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first offense, by a fine of not less than two hundred dollars nor more than one thousand dollars and imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt, by imprisonment in the penitentiary not exceeding two years and not less than one, in the discretion of the court or judge thereof."

Again, "The accused may plead in the same manner as to an information or indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits or both. The defendant may be *required to make answer to interrogatories either written or oral* as in the discretion of the court or a judge may seem proper." And again, "The practice in such contempt proceedings shall conform as nearly as may be to that adopted by the Ninetieth Rule of the Supreme Court of the United States

for proceedings in equity in the circuit courts." And this same statute denies to a defendant in such proceedings the right of trial by jury.—Statutes of North Dakota, Chapter 110, Laws of 1890.

The Supreme Court of North Dakota sustained as constitutional both under the constitution of that state and that of the United States, all of such proceedings.—*State vs. Markuson, 73 N. W. Rep. 82.* Under this condition of affairs what becomes of the right of trial by jury secured to all under section 7 of Article I of the constitution of the State of North Dakota? Section 217 of Article XX of the Constitution confers upon the Legislative Assembly the power to provide suitable penalties for the violation of that article. The prohibitory legislation of the State of North Dakota is authorized by the provisions of Article XX, and the penalties provided in that act must be enacted under the same article.

A provision of statute punishing a contempt of court in such proceedings must therefore be construed to be one of the penalties authorized for a violation of that article; and when that penalty creates an infamous crime and subjects the citizen to the consequences thereof, it would seem that such accused person would be entitled to the protection of Section 7, Article 1. of the same constitution.

This position may be summed up in the statement that the Legislature cannot do indirectly what it is forbidden to do directly. If the Legislature of North Dakota acting under their constitution can abrogate the right of trial by jury in criminal pro-

ceedings under the prohibitory statutes, they may, with equal propriety, abrogate the right of trial by jury in any other criminal proceeding. Yet section 7 of Article 1 says that the right of trial by jury shall be secured to all and remain inviolate.

Again, is it within the power of the Legislature of North Dakota to declare a contempt of court committed in proceedings to enforce the prohibitory article of the constitution, a felony, while a contempt of court committed in any other proceeding is merely a misdemeanor. It seems to us that such legislation savors of unequal legislation and is directly contrary to the constitutional provisions that have been cited upon that subject.

It may be that a thorough review of the constitution of the United States and of the construction placed upon it by this court may lead to the conclusion that such constitution does not guarantee to a citizen of the United States accused of felony or infamous crime the right of trial by jury, except only in the Federal tribunals. That in other words, the constitution of the United States in this respect protects its citizens only against its own courts and congressional legislation, and that it is powerless in this respect as against legislation or proceedings by the states. But if this is true, the large majority of our citizens have been mistaken in their view of the protection guaranteed to them by the constitution of the United States.

The following authorities seem to sustain the position that this legislation is clearly in violation of

the provisions of the constitution of North Dakota and of the Fourteenth Amendment to the Constitution of the United States. If it is it must be void, as the constitution of North Dakota so far as the rights and privileges of citizens of the United States are concerned is necessarily a compact with the United States and must secure to those citizens the rights and privileges to which they were entitled under the constitution of the United States at the time of the passing of the Enabling Act and the adoption of the Constitution of the State of North Dakota—*Frazer vs. McConway, &c., Co., 82 Fed. 257; In re Hong Wah, 82 Fed. 623; Sutton vs. State (Tenn.) 36 S. W. Rep. 697; Shaver vs. Pennsylvania Co., 71 Fed. 931;* 3rd Am. & Eng. Enc. of Law, bottom pages 714-15, and cases cited; *Ex. Parte* Grace, 12 Iowa, 208.

The next proposition we submit for the consideration of the court is that assuming the constitutional rights of the petitioner to have been violated and that he is in custody of the state authorities in violation of the constitution of the United States, is this proceeding by habeas corpus the proper remedy?

It appears in this case that the appellant has exhausted his remedies in the state courts including the highest court of the State of North Dakota. It also appears that in all of these proceedings he has steadfastly asserted what he claims to be his constitutional rights, and it also appears that in each step in the proceedings these asserted rights have been as constantly denied.

It also appeared that at the time of his application for the writ of habeas corpus that he was with-

out means to prosecute an appeal or writ of error from the Supreme Court of the state of North Dakota to this court. Under these circumstances we respectfully submit that the writ of habeas corpus is his proper and appropriate remedy, from a Federal court authorized to issue it; and upon this we cite the determination of this court in Re Neagle 135 U. S. 1.

We are fully aware of the expressions of this court in Whitton vs. Tomlinson, 160 U. S. 231, and Pepke vs. Cronnan, 155 U. S. 100; but we assert with great confidence that the doctrine established In Re Neagle, supra, has never been departed from or attenuated by any subsequent decision of this court, and that upon the question of life or liberty, the interests and rights of the humblest citizen of the United States, are fully upon a par and entitled to precisely the same consideration as that of a citizen of the United States who happens to be at the same time a Deputy Marshal of the United States.

We therefore conclude upon this point that the procedure which we have invoked is the proper one to enable us to be fully and completely heard and a proper conclusion and determination reached by this court.

Lastly, are the proceedings under consideration which have culminated in the confinement of this appellant in the penitentiary at Bismarck under a sentence thereto for one year, the exercise as against him of due process of law? That a sentence

to the penitentiary necessarily involves a conviction of the defendant for an infamous crime, is too well settled to require the citation of authorities.

That it is a felony appears by section 6804, Rev. Code of North Dakota, 1895.

That except upon a plea of guilty duly made in open court no person has ever been convicted of an infamous crime by the civil courts of the United States and that conviction sustained, is confidently asserted. And we challenge the production of any authority holding that such conviction is lawful,—except of course the determination of the Supreme Court of North Dakota.

That in proceedings as against the lives or liberties of citizens of the United States no court or legislation can effect indirectly that which it is powerless to effect directly, is a logical deduction and conclusion from the slightest examination our form of government and of the rights guaranteed to the citizens thereof.

That the particular means pointed out by this court for the assertion and vindication of these constitutional rights are to some extent varying and conflicting we are well aware, and that the expressions of this court upon this subject are to a certain extent contradictory and perhaps obscure may also be admitted. But when the question is fully, completely and fairly presented as in this case, it is believed that it will be met and determined as fully, decisively and clearly as its importance demands.

Considering the expression of this court in Marchant vs. Railroad Company, 153 U. S. 380, and

the cases cited; Hodgson vs. Vermont, advanced opinion October term, 1897, number 3, page 90; *Ex Parte* Converse, 137 U. S. 624; Hurtado vs. California, 110 U. S. 516, and that of the court of appeals in Benton vs. Platter, 10 U. S. App. 657, we do not think it can be fairly asserted that the porceedings of the court of North Dakota or the legislation upon which they are based can be considered due process of law.

The opinion of the Supreme Court of Massachusetts, Jones vs. Robbins, 8 Gray 329; Commonwealth vs. Horrigan, 127 Mass. 450, are to the like effect.

In Re Kemmler, 136 U. S. 436, the court says at page 448,—"As due process of law in the Fifth Amendment, referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law, so in the Fourteenth Amendment the same words refer to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice requires that no different or higher punishment shall be imposed up-

on one man than is imposed upon all for like offenses."

And again in Re Converse, 137 U. S. 624, the court says at the bottom of page 631,—"We repeat as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses."

Is this doctrine impinged upon by requiring a man to testify against himself? The offense here is contempt or court, yet this appellant is imprisoned for a year in the penitentiary, while his fellow citizens who commits the same offense, to-wit,—contempt of court in another proceeding is punished as for a misdemeanor.

Among the latest expressions of this court upon this general subject, the court says,—"We concede the proposition so earnestly urged on behalf of the plaintiff in error that by the Fourteeth Amendment is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether in the enactment and administration of the criminal laws of the state it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by

quoting the language of this court in *Ex. Parte* Converse."—Hodgson vs. Vermont, advanced opinion, December 15, 1897, No. 3, opinion page 93.

The Supreme Court of North Dakota in affirming the conviction in this cause, uses the following language,—"While the statute expressly authorizes the punishment here inflicted and while constitutional courts recognize the legislative right to control their power to punish for contempt, so long as such control does not lessen the effectiveness of such power, yet the power itself is not derived from or in any manner dependent upon the statute. It is a necessary inherent power, and as shown in the former opinion, State vs. Markuson, 5 N. D. 147, this must be so or courts must abrogate their functions. And this power must include the right to punish to an extent that will secure obedience to its lawful orders, and as we in effect said in the former opinion, it is entirely immaterial whether this punishment falls within or beyond the limit that our statute fixes as a punishment for misdemeanors." State vs. Markuson, 73 N. W. Rep. 81.

If the opinion of the Supreme Court of North Dakota as to its inherent power is here correctly described, there is no limit upon that power. "And this power must include the right to punish to an extent which will secure obedience to its lawful orders,"—Where is the limit? Suppose that the Supreme Court of North Dakota, or any other record tribunal of that state, should conclude that death was a necessary punishment "to secure obedience to its lawful orders",—would that be considered due

process of law? And is it possible that the judgment of the court of North Dakota in this case depends upon and is pronounced by reason of "the inherent power" of that court. Was not the sentence pronounced and the punishment inflicted, the statutory sentence and punishment? And is it not conclusively presumed that the court in that proceeding was proceeding in accordance with the statute and not upon its inherent power"? Has any court of North Dakota "the inherent power" to compel a man to be a witness against himself; to answer any questions that the court may see fit to propound, either orally or in writing? Besides a practice of this character the proceedings in the Dreyfus case in Paris are commendable, intellibible and of exceeding regularity. But like those proceedings, the conclusions of the Supreme Court of North Dakota and the proceedings therein, are unknown, either to the common law or constitutional tribunals created and existing under the authority of the United States or the constitution of the several states.

The questions presented in Spies vs. Illinois, 123 U. S. 131, is entirely different. And in Eilenbecker vs. District Court of Plymouth County, 134 U. S. 31, merely holds that proceedings "According to common law for contempt of court are not subject to the right of trial by jury, and are due process of law within the meaning of the Fourteenth Amendment to the Constitntion." But at common law no person could be convicted of an infamous crime or felony by reason of committing a contempt of court, and the conviction in the Eilenbecker case was

merely for a misdemeanor. Beside, the proceeding in this case was wholly statutory.

But as against the expressions of this court in that case (Eilenbecker vs. District Court, etc.) we cite the expressions of this court in Re Naegle, supra, and also call the attention of the court to the following expression in the opinion in Eilenbecker vs. District Court, etc., supra, pages 39 and 40.—

"We might rest the case here; but the plaintiffs in error fall back upon the 'proposition that the statute of the Iowa Legislature concerning the Sale of liquors under which this injunction was issued, is itself void as depriving the parties of their property without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued for the contempt of which these parties have been sentenced to imprisonment, and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same

within this state, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the state legislature."

There can hardly be any question at this day in the case at bar that an adoption of the argument just quoted would result in what would be, if committed by a defendant or appellant, an evasion of the question sought to be determined. Such conduct is not tolerated upon the part of parties defendant, and is not practiced by the court.

If under the peculiar proceedings provided for by the legislature of the state of North Dakota, the court after the commencement of the main action, abandons that, and by imprisoning the parties defendant in the penitentiary for acts committed *pendente lite*, thus terminates the proceeding; such a course is certainly as to such defendants, the main part of the action. And it is hardly a sufficient remedy to the citizen who has served his term of one or two years in the penitentiary, to advise him that after he comes out he may, in the main proceeding, attack the constutionality of the statute. We do not believe that in this case this court will adopt the view presented in the authority last cited.

It follows then, from what we have said, that the questions here presented, occur for the first time in the history of the administration of the law in the United States. That for the first time a citizen has been convicted of an infamous crime and felony without a plea of guilty or the intervention of a jury. That for the first

time a state has by its legislation upon the subject matter of the liberty of the citizen, deliberately violated the provisions of its own constitution as well as every right and tradition concerning the liberty of a citizen.

One last consideration we desire to earnestly urge upon the court, —and that is, the construction to be applied to Section 3 of Article 1 of the Constitution of the State of North Dakota. At the time of the adoption of the constitution of the said state, as we have pointed out, all of the present amendments to the Constitution of the United States were in force. This court had held and determined that the first ten amendments to the constitntion of the United States were applicable only to the proceedings in the Federal Courts, but they also held that the provisions of the Fourteenth Amendment were obligatory upon the states and state legislatures and tribunals.

However, as this may be, at the time of the adoption of the constitution of the state of North Dakota by the people of that state; the constitution of the United States, both the original document and the fifteen amendments thereto, were in full force and existence, and certainly formed but one document, except in so far as the application of the amendments to the states had been affected by the construction placed upon them by this court.

Now, while this state of facts existed, the State of North Dakota provided in its constitution, Article 1, section 3, "The State of North Dakota is an in-

separable part of the American union, and the constitution of the United States is the supreme law of the land. Does this article refer, by any fair construction, to the original constitution of the United States excluding the amendments, and, if so, what amendments does it exclude? By the words "the supreme law of the land" what did the people of North Dakota mean? Unquestionably, the law of their own land, the "law of the land" comprising the said State of North Dakota. They could not mean to declare in their constitution what "the law of the land" was, as either to the United States or to the other states of the union. The United States was their superior, the other states their equal.

They were legislating on the subject of their state, and if this section of Article I of that constitution means anything, it means that from the time of the adoption of the people of North Dakota of the constitution which they did adopt, that the constitution of the United States and all of the amendments to the constitution of the United States, was and is the "supreme law of the land" so far as North Dakota is concerned; certainly so far as personal, rights, privileges and liberties are concerned.

If it means what we say it does, the proceeding in this case has violated every right secured to a citizen or sought to be secured to a citizen by its adoption.

In People of New York, ex rel. Parke, et. al. vs. Roberts, Comptroller of the State of New York, advanced opinion of this court, November 22nd, 1898, No. 2, page 63, there appears in the opinion of Mr.

Justice Harlan on page 66 of the report, the following language,—"If this can be done in reference to liquors, it can be done with reference to all the products of a sister state, and in this mode one state can establish a complete system of non-intercourse in her commercial relations with all the other states of the Union."

Now we respectfully submit, that if in a proceeding to enforce the prohibition laws of the State of North Dakota the legislature of that state can declare an act in violation of such laws, criminally infamous and a felony, and proceed to award punishment by imprisonment in the penitentiary for a minimum period of one year therefor, without the intervention of a jury, indictment or information, and by compelling a party charged, to be a witness against himself, they can make the same provisions as to any other offense, either at common law or statutory. And can by this means deprive a citizen of the United States within their limits of every right secured to him, concerning his personal liberty, under an accusation of crime.

We are not urging upon this court a demand that the prohibitory liquor laws of the state of North Dakota; either constitutional or legislative, shall be declared to be void. This cause is not presented on behalf of the liquor traffic. We recognize fully the right of that state to provide any reasonable punishment for a violation of this law or any other laws that their legislature may constitutionally pass. But we do ask, that in proceedings through their courts for the punishment

of an offender they shall recognize the existence of the constitutional rights of such defendant, and proceed in the enforcement of their laws according to what are now recognized to be the fundamental principals of ordinary justice as applied to any prosecution of any character or description.

And it is submitted, that the order of the court below should be reversed, and the appellant should be discharged from custody.

C. D. O'BRIEN,
Counsel for Appellant.